satisfied that all the title deeds in the safe were included in the Petition for Letters of Administration. The titles in issue in this case were not included in the Petition for Letters of Administration to the Estate of the deceased. It was the plaintiff's case that he only came to know about these 5 title deeds in 1957 when one Noordin told him about them and then on investigation he found that the lands were still registered in the deceased's name. He then took the steps necessary to have his name registered as the proprietor as Administrator of the Estate of the deceased.

I was not favourably impressed by either the story told by the plaintiff or by the story told by the defendant.

The plaintiff admitted that he could identify the pieces of land on the ground quite easily and that in the life time of his father he knew the pieces of land belonged to his father. In other words these pieces of land were well known to him. As I have already observed, in examination in chief the plaintiff stated he did not know whether the Grants, the subject of this suit, were in the safe. In cross-examination he said that when the Solicitor opened the safe to take out the contents he, the plaintiff, discovered that the title deeds of these 5 pieces of land were not there. He added that he thought the deceased must have kept them somewhere else. At the conclusion of his evidence I asked the plaintiff whether he told his Solicitor about the title deeds when he discovered that they were not in the safe. He replied that he did not know whether the Grants were there or not. When I drew his attention to the fact that he had just said that they were not there, he then said that he did not tell the Solicitor. When I then asked him why he did not tell the Solicitor, he replied that he did not tell him because he did not know the whereabouts of the title deeds.

It became apparent on this evidence therefore that the plaintiff was a man upon whose evidence no reliance could be placed, and on weighing the evidence carefully I have come to the conclusion on the balance of probabilities that the plaintiff knew that these title deeds were not in the safe, that he knew that the titles were not included in the Petition for Letters of Administration, and that the reason he had done nothing about it until 1957 was because he knew that there had been a purported sale of these pieces of land to the defendant in 1937. He only became active in the matter when he learnt in 1957 that these lands were still registered in the name of the deceased.

I find therefore that there was a transaction which purported to be a sale, but I am not prepared to accept the defendant's account of that transaction and of what took place. The defendant's reason, so he said, for not registering the conveyance, which he said was prepared by a Solicitor and executed by the deceased in the Solicitor's office, was because there was a mistake in it. He said that the mistake was that one of the pieces of land had been omitted and that the conveyance should have been in respect of five pieces of land but only four were in fact included. When he was asked why he did not have the conveyance rectified before the deceased went to Mecca in view of the fact that he had noticed the mistake the day after the conveyance was executed, he replied that the deceased was away the next day, from which I understood him to mean that the deceased went to Mecca the next day. However it appeared to be clear from one of the defendant's own witnesses (DW3) that the deceased did not leave for Mecca until some 5 or 6 months after the purported sale had taken place.

The defendant also gave no satisfactory explanation of how the conveyance came to be lost. Nor did he give any satisfactory explanation as to why he took no steps to get the conveyance rectified and himself registered as proprietor between the deceased's return from Mecca in 1939 and the Japanese occupation.

On carefully considering the defendant's evidence together with that of DW3, I am satisfied that the transaction that took place between the deceased and the defendant purported to be a sale, but I think on the balance of probabilities that what occurred was that the defendant handed a cheque for $1,500 to the deceased and that the deceased in return, either then or at a later stage, handed the documents of title to the defendant. In other words what took place was a verbal agreement for the sale of these properties by the deceased to the defendant for $1,500.

There is no evidence of any memorandum in writing evidencing this agreement, and as a result this verbal agreement is in my opinion unenforceable.

I therefore order that the purchase be set aside and such title deeds as are in the possession of the defendant be returned to the plaintiff on the plaintiff repaying to the defendant the purchase money of $1,500. I further order that both parties pay their own costs. There will be no order in respect of the remaining prayers contained in the Statement of Claim and the Reply.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*; *Allen & Gledhill.*

NIAZ BI BI v. MOGAH OMNIBUS CO. LTD.

[O.C.J. (Good J.) September 18, 1959]

[Ipoh — Civil Suit No. 160 of 1958]

Practice and Procedure — Trial — Judge trying issues of fact — Application for rule on question of law distinguished from that of fact — Discretion.

Companies — Company practice — Distribution of net profit — Practice ultra vires powers of directors — Companies Ordinance, 1940, s.12.

Where a Judge is sitting alone and trying issues of fact, it is highly inconvenient that he should be asked

to give a ruling on the facts at the close of the plaintiff's case without hearing the defence because of the existence of the Court of Appeal to which the case may go further. The position is entirely different where it can be distinguished between an application to the Judge to rule on a question of law and where an application is made to the Judge to rule on a question of fact at the close of the plaintiff's case.

A distinction should be borne in mind between a case where at the close of the plaintiff's evidence the Judge is asked to rule as a matter of law that the plaintiff has failed to establish his case, and a case where at the close of the plaintiff's case the Judge is asked to rule that the evidence is insufficient to support it.

In this case the plaintiff as administratrix of her husband's estate claimed that "It was a practice of the defendant company to allow the shareholders to work for the defendant company as drivers at wages at the rate of $8.00 a day. If the shareholder was not a driver himself, he was allowed as a matter of right to engage another driver in his place and pay him at his own cost and keep the difference between the said $8.00 per day paid by the defendant company and the wages he paid to the driver engaged by him." There was some evidence of the existence of such a practice of the defendant company which practice was decided by the directors in the secretaries' office and was known to the shareholders. The decision by the directors was *ultra vires* their powers.

Held: (1) in order to show that she was entitled to the relief which she claimed, the plaintiff must show that the benefit which she said ought still to accrue to her husband's estate was a benefit attaching to the share which she held as part of the estate of her deceased husband. If it was a benefit attaching to the share then it was not extinguished by the death of her husband but it continued to form part of the estate and it vested in her as his administratrix;

(2) the only way by which the benefit could attach to the shares in the company was if provision to that effect had been made in the articles of association; no such provision has been made in the articles and even if the directors acted as they are alleged to have, they were acting *ultra vires* and therefore the practice did not confer upon the plaintiff any claim in law.

Cases referred to:—

(1) *Young* v. *Rank* [1950] 2 K.B. 510.

(2) *Parry* v. *Aluminium Corpn. Ltd.* [1940] W.N. 44.

CIVIL SUIT.

K. L. Devaser for the plaintiff.

R. H. V. Rintoul for the defendants.

Good J. giving oral ruling: On this question of procedure I have referred to only two authorities — the judgment of Devlin J. in *Young* v. *Rank*,(1) and the judgment reported in the third person of Goddard L.J., as he then was, in *Parry* v. *The Aluminium Corporation Ltd.* (2) — and, as I see it, it is perfectly clear that the ratio of the practice which has received the approval of many eminent Lords Justices in England is that where a Judge is sitting as Judge and jury, that is where a Judge is sitting alone and trying issues of fact, it is then highly inconvenient that the Judge should be asked to give a ruling on the facts at the close of the plaintiff's case without hearing the defence because of the existence of the Court of Appeal to which the case may go further. The position as I see it is entirely different where you can distinguish between an application to the Judge to rule on a question of law and where an application is made to the Judge to rule on a question of fact at the close of the plaintiff's case.

In the case of *Parry* v. *The Aluminium Corporation Ltd.*, *supra*, the issue was a simple straightforward issue of fact: "Was a certain machine properly secured?" And there Goddard L.J. made it perfectly clear that in his opinion (and he was following the opinions expressed in the same Court by Mathew L.J. and also expressed by Horridge J.) that in such a case the Judge on being asked to rule on a question of fact at the close of the plaintiff's case that there was no evidence sufficient to go to the Judge sitting with a jury, ought to say to counsel: "Are you going to call any evidence?" and if counsel says: "I am not going to say whether I am going to call any evidence" the Judge should say: "You must call your evidence; and then I will rule whether or not, on the whole of the case, there is a case to go to the jury or not." But Goddard L.J. went on — and I think it should be emphasised that all through that part of the judgment he is talking about cases of negligence which are primarily cases of fact — he went on to say that there are cases where the other course may be taken and he gives examples. There is authority for the view that in defamation cases, for instance, if it was submitted that there was no evidence of malice, the Judge was bound to rule; and so, in slander cases, if the submission was made that the words were not actionable without proof of special damage, the Judge was bound to rule if no special damage was alleged. In other words, it seems to me clear that a distinction has been proved and should be borne in mind between a case where at the close of the plaintiff's evidence the Judge is asked to rule as a matter of law that the plaintiff has failed to establish his case, and a case where at the close of the plaintiff's case the Judge is asked to rule that the evidence is insufficient to support it.

Here, as I understood Mr. Rintoul's submissions yesterday, what he says is that even if the evidence given by the plaintiff is accepted in toto and is unrebutted or unexplained by the defendants she has not succeeded in showing that she is entitled to the relief which she claims because, as a matter of law, she is not entitled to claim it. That being the case, I am of the opinion in the light of those authorities that I have a discretion to rule at this stage without putting counsel for the defendants to his election as to whether, assuming that the plaintiff's evidence is accepted in toto, she has made out a case on the law and I propose to exercise that discretion after hearing counsel's arguments on Mr. Rintoul's submission that in law plaintiff, on the case that she has made out, is not entitled to succeed.

After hearing counsel's argument,

Good J., delivered the following oral judgment: The substance of the plaintiff's case is

contained in paragraphs 6 and 7 of her Statement of Claim, and it is as follows:

"It was a practice in the defendant company to allow the shareholders to work for the defendant company as drivers at wages at the rate of $8.00 a day. If the shareholder was not a driver himself, he was allowed as a matter of right to engage another driver in his place and pay him at his own cost and keep the difference between the said $8.00 per day paid by the defendant company and the wages he paid to the driver engaged by him."

There is some evidence of the existence of such a practice in the Mogah Omnibus Co. The evidence of the plaintiff herself on this point is negative because it consists of hearsay. In the circumstances, she naturally was not in a position to have first-hand knowledge of the management and administration of the company. She called two witnesses: one was the present managing director who has been in the company for a long time, and the other was a gentleman named Sher Mohamed who was the manager for about a year in 1947 and 1948. The present managing director, Mr. Sutan Mohamed, says that the practice alleged by the plaintiff did not exist; and Mr. Sher Mohamed says that during his time as manager it did.

For reasons which I gave in the course of my ruling on the submission of defence counsel at the close of the plaintiff's case, I do not wish to become involved in an examination of the evidence in the case with a view to coming to any conclusion as to whether I believe Mr. Sutan Mohamed and disbelieve Mr. Sher Mohamed or *vice versa*. I have decided to adopt this position: assuming that the practice existed, has the plaintiff established her claim? It seems to me that in order to show that she is entitled to the relief which she claims, she must show that the benefit which she says ought to have accrued to her husband and ought still to accrue to her husband's estate was a benefit attaching to the share which she now holds as part of the estate of her deceased husband. There is no doubt at all if it is a benefit attaching to the share then it is not extinguished by the death of the plaintiff's husband but it continues to form part of the estate and it vests in her as his administratrix. In my view this special or unusual benefit could only attach to the share in this company if provision to that effect has been made in the articles of association. No such provision has been made and, indeed, it seems to me, if one reads article 108, that it provides the only method of distributing the net profits of the company amongst the shareholders.

Mr. Sher Mohamed says that this practice was decided by the directors in the secretaries' office and was known to the shareholders; but any such decision by the directors even with the knowledge of the shareholders would be *ultra vires* the powers of the directors. Under the articles of association they cannot go outside the terms of article 108. The only way by which this practice — assuming that it existed — could have been made legal was by an alteration of the articles of association. The law is quite explicit. Section 12 of the Companies Ordinance reads:

"Subject to the provisions of this Ordinance and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles."

The special resolution is a very formal, solemn and technical matter which is dealt with in section 118. There is no evidence of any amendment of the articles of association by the only method by which they could have been amended, and therefore the position is governed by the articles of association as they stand. And in the absence of any provision for the arrangement — which again I say I will assume to have existed without finding as a fact whether it did or not — the only way by which that arrangement could have been legalised was by inclusion in the articles of association; and in its absence I am bound to hold that if the directors acted as Mr. Sher Mohamed says they did, they were acting *ultra vires*.

The plaintiff has come to this Court to ask for the blessing of the Court upon an arrangement on which she hopes — if I may use the expression without intending any offence — to "cash in." She knows or believes that that other people have cashed in on this irregular arrangement, and she does not want to be left out. That does not confer upon her any claim in law. And, therefore, without calling upon the defendants to elect whether to give evidence or not — without, in short, calling upon the defence — it appears to me that this claim as a matter of law — and accepting the evidence as being in favour of the plaintiff — as a matter of law has not been made out. Consequently, the claim is dismissed with costs.

Claim dismissed.

Solicitors: *K. L. Devaser & Co.*; *Shearn Delamore & Co.*